NO. 80-474

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE PROCTOR & GAMBLE MANUFACTURING COMPANY,
PETITIONER,

v.

DENNIS FISHER,
RESPONDENT.

ON PETITION FOR A WRIT TO CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

PHILIP I. PALMER, JR.
PALMER, PALMER, COFFEE & BUSH
840 ONE MAIN PLACE
DALLAS, TEXAS 75250
(214) 748-1211

ATTORNEYS FOR RESPONDENT

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Respondent, Dennis Fisher, respectfully submits Brief in opposition to Petitioner's Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and prays that said Petition be denied.

STATEMENT

Although Petitioner's Dallas plant is located in the heart of South Dallas, a predominantly black community, (JA p.163) no black employees were hired until sometime in the 1960's (Finding of Fact #18, Appendix B to the Petition). By January 1, 1977, however, blacks constituted 14.7% of Petitioner's total workforce and 35.5% of all non-management employees having seniority dates after July 1, 1966. (Finding of Fact #20, JAX p.)

In most instances Petitioners non-management employees are hired into various entry level positions requiring few prior skills. Thus with certain limited exceptions the higher level non-management positions are filled by promotion from within the plant. (Finding #33, App. B). The Collective Bargaining Agreement between Petitioner and the Union provides that where ability and merit as judged solely by the employer are approximately equal, plant seniority is the governing factor in both promotions and demotions. (Finding of Fact #8. Appendix B to the Petition).

As a direct legacy of its past refusal to hire black employees, Petitioner's Dallas plant has long suffered from racial tensions and incidents at times involving upper management (App. B. to the Petition. Although in recent years Petitioner has addressed the problem and taken some steps to ameliorate the racial tensions at its Dallas plant, the trial court found that its voluntary actions had not been completely effective and enjoined the Company to take additional measures under court supervision. (App. F to the Petition).

THIS COURT HAS RECOGNIZED THE SUFFICIENCY OF WORKFORCE STATISTICS AS PRIMA FACIE PROOF OF DISCRIMINATION

The central issue raised by the Petition challenges the legal sufficiency of Plaintiff's *prima facie* case of racially discriminatory employment practices. Petitioner contends that Plaintiff's case was insufficient to establish a *prima facie* violation of Title VII because it was based upon current workforce statistics, and therefore did not control for the effects of seniority and pre-Act hiring and promotion decisions.

In *Hazelwood School District v. United States,* 433 U.S. 299, 308 this Court expressly recognized the validity of current workforce statistics as sufficient evidence, *prima facie* of Title VII prohibited discrimination (noting at pp 308-309 that disparities between workforce representations of 1.4% and 1.8% as compared to 5.7% availability figure were on their face substantial). The rationale for accepting such proof *prima facie* as evidence of illegal discrimination was previously articulated by this Court in *Teamsters v. United States,* 431 U.S. 324:

> "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired;" at 340 n. 20.

To be sure, *Hazelwood* and *Teamsters* recognize that a *prima facie* showing of discrimination based upon gross workforce disparities can be rebutted by any evidence which establishes a nondiscriminatory explanation for the disparities, such as proof that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination" *Teamsters supra* at p. 360.[1]

Significantly, both *Teamsters* and *Hazelwood* recognize that the burden of factoring out the effects of neutral (in the sense of non illegal) factors such as pre-Act hiring, etc. falls on the employer, not the Plaintiff class. This is not an unfair burden to place on the employer since the employer is clearly in the better position to produce records reflecting such material information as vacancies, qualifications, etc.[2]

Both *Teamsters* and *Hazelwood* recognize that an employer can rebut a *prima facie* showing of racial discrimination based on workforce statistics by proof that

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[1] There is some disagreement whether *Teamsters* represents a disparate impact or disparate treatment theory of Title VII liability Resolution of this nice distinction would appear to have little practical utility since an employer whose "explanation" of apparent discrimination is based upon any neutral practice having adverse impact upon a Title VII protected group would presumably also bear the burden of establishing that such practice was justified as a business necessity within the meaning of *Griggs v. Duke Power Company*, 401 U.S. 424. See *Croker v. Boeing Company*, 437 F. Supp. 1138 1182. (E. D. Pa 1977).

[2] It should also be noted that employers are required by law to maintain adequate records to establish their compliance with Title VII. 42 U.S.C. §2000e-8(c).

its employment decisions *since the effective date of the Act* were made in a completely condiscriminatory way, (emphasis supplied). Petitioner, however, made no effort to establish that all its promotional decisions since July 2, 1965, had been free of racial discrimination. Instead, citing *United Airlines v. Evans*, 431 U.S. 553, Petitioner contended that the only relevant promotional decisions were those that occurred during the period from September 10, 1970 (180 days before Plaintiff filed his EEOC Charge) and January 1, 1977.[3] Thus, Petitioner generally produced no information regarding actual vacancies filled by promotion during the critical period from July 2, 1965 until September 10, 1970.[4]

Closely related to the challenge to Plaintiff's *prima facie* case is Petitioner's argument that Plaintiff failed to establish that the class of black employees were adversely affected by any of its promotional practices, apart from the operation of the seniority system. Again, Petitioner argues that only statistics which control for the effects of seniority, as well as pre-Act hiring and pre limitation period (September 10, 1970) promotion decisions can establish adverse impact. Thus Petitioner argues not only that current force statistics are inadequate to establish adverse impact, but also that the only relevant statistics for this pur-

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[3] The trial of this action began January 11, 1977.

[4] In addition to considering only promotions made after September 10, 1970, Petitioner's analysis assume that all promotions made after that date are of equal weight regardless of their relative proximity to trial.

pose concern those promotions made on or after September 10, 1970 (180 days before Plaintiff filed his EEOC Charge). In addition, Petitioner argues that adverse impact occurs only when a more senior black employee is bypassed for promotion by a junior white employee. Thus Petitioner introduced no analyses which directly controlled for the effects of seniority on its promotional decisions, by comparing the relative number of promotions awarded to the class of black employees with the promotions awarded to their white counterparts (i.e. white employees having similar seniority) See *Swint v. Pulman Standard*, 539 F2d 77 (5th Cir. 1976). Petitioner's approach was thus deficient in two respects: (1) it failed to control for the incidence of promotion among white employees having similar seniority to the Plaintiff class and (2) it included only those employees who actually bid on jobs, thereby excluding from consideration black employees having sufficient seniority who were deterred from bidding on certain jobs by their belief that they could not satisfy Petitioner's standards of ability and merit.

In reviewing the trial court's decision, it is further important to remember that Plaintiff's case was not limited to statistical proof. For instance, the trial court made findings of overt acts of discrimination reflecting active bias against potential black managers.[5] The trial court further found *inter alia* that racial slurs were periodically directed at Petitioner's black employees (Finding No. 58, App. B),

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[5] The trial court specifically found that in March of 1976 the plant Manager at Petitioner's Dallas plant stated that the white employees would have to approve whomever was selected as the first black supervisor (Finding No. 27, Appendix B to the Petition).

that Petitioner's upper management made racial slurs (Finding No. 57(e) App. B) the discriminatory assignment of black employees to the undesirable job of slide handler (Findings No. 54-56, App. B) and that during the pendency of this suit Petitioner's management viewed blacks as inferior to whites (Finding No. 57, App. B). The probative force of such nonstatistical evidence to strengthen the inference of discrimination arising from Plaintiff's statistical proof is well settled. *Teamsters v. United States*, 431 U.S. 324.

Thus unlike the lower courts in *Hazelwood v. United States*, 433 U.S. 299, here the trial court did consider the explanations offered by Petitioner, but concluded that Plaintiff had established class-based racial discrimination by a preponderence of all the credible evidence (Appendix B to the Petition).

BECAUSE OF THE UNUSUAL FACTS, THIS CASE HAS SLIGHT PRECEDENT VALUE

Petitioner's expressed concern that the decision of the Fifth Circuit if undisturbed, will discourage employers from undertaking voluntary affirmative action to ameliorate past racial imbalances in their workforces is unwarranted. A careful reading of the decisions rendered by both the trial court and the Appellate Court will show that Petitioner has not been enjoined from continuing the use of Total Assessment in awarding promotions to mechanical and lab analyst positions. To the contrary, both Courts recognized the positive potential which total assessment offered to the class of black employees. The single aspect of total Assessment which the trial court found objectionable

was its extensive subjectivity coupled with the total absence of black supervisors and the evidence of overt racist attitudes on the part of the white supervisors and managers. Thus, Petitioner may continue to use its present total assessment programs in making promotions to mechanical, lab analyst, and possible management positions by simply eliminating the absence of black supervisors at its Dallas plant and taking reasonable measures to counter the remaining unfortunate racist attitudes on the part of the management of the Dallas plant.

Petitioner indicates that as a result of this decision, it will be compelled to base its promotional decisions strictly on seniority to the ultimate harm of the Plaintiff class. To place matters in perspective, however, it is important to note that the Company has never based promotions to those positions it deems as critical on the sole basis of seniority. Before the fairly recent institution of total assessment, Petitioner utilized certain tests to determine relative ability and merit. However, testing and seniority were not the sole determinant factors. Since senior applicants scoring in the acceptable range or higher were at times bypassed for promotion and at times senior applicants with less than acceptable scores were, in fact, promoted. Thus at all times the Company has utilized various subjective factors to supplement the objective testing of ability and merit. Viewed in this context, the decision below will have minimum impact upon the Company's legitimate affirmative action efforts.

CONCLUSION

The decisions of the lower courts in this case are consistent with the decisions of this Court and present no matter which requires a determination by this Court. Accordingly, Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Philip I. Palmer, Jr., of the firm of
PALMER, PALMER, COFFEE & BUSH
840 One Main Place
Dallas, Texas 75250
(214) 748-1211

ATTORNEYS FOR THE RESPONDENT

CERTIFICATE

This is to certify that a copy of Brief of Respondent in Opposition was this, the 28th day of October, 1980, served upon Erwin N. Griswold by mailing the same to him at 1735 Eye Street N.W., Washington, D. C. 20006.

PHILIP I PALMER, JR.